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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

UNITED STATES ex rel. FELICITAS A. DRISCOLL,
Relator,
vs.
JUDGES OF THE MISSOURI SUPREME COURT,
Respondents.
} No. 947.

FELICITAS A. DRISCOLL,
Petitioner,
vs.
ERNEST R. KONZE,
Respondent.
} No. 947.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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FELICITAS A. DRISCOLL, Petitioner, vs. ERNEST R. KONZE, Respondent.	No. 947.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

REPORTER CITATION.

The case below is reported as *Driscoll v. Konze*, 322 S. W. (2nd) 824.

STATEMENT OF CASE.

Petitioner at page 4 of her petition inaccurately states that "the Court held on January 21, 1957, that the 1949 judgment of revival was invalid, because the non est return was not of itself sufficient basis for the order of publication and the subsequent judgment of revival."

The date of such ruling was in fact November 12, 1956.

Driscoll v. Konze, 296 S. W. (2nd) 31.

The date mentioned in the petition is the date on which the mandate of the Supreme Court was filed in the Circuit Court (R. 33) and not the date of the Supreme Court's decision.

ARGUMENT.

I.

The Judgment of the Supreme Court of Missouri Did Not Adjudge Any Federal Right.

There was no constitutional or federal question inherent in the case below, and in fact the opinion of the Supreme Court of Missouri attached to the petition as an appendix discloses no such question.

Petitioner's prayer for a writ of certiorari is based solely and exclusively upon a single paragraph of the State Court's opinion reading as follows (Appendix ix, 322 S. W. [2d] 824, l. c. 829):

> "We think it is not possible to satisfactorily state even general standards by which it may be determined when and under what circumstances one's lack of diligence to proceed in the issuance of process may amount to a discontinuance of the action or destroy the effectiveness of a pending proceeding. Each situation must depend upon all the circumstances in which the relevant facts appear."

Immediately preceding the foregoing obiter dictum from the opinion, the judgment of the Court is epitomized as follows (Appendix viii and ix, 322 S. W. [2d], l. c. 828-9):

> "The decisive fact in the instant case is that when this Court's mandate was filed in the trial Court on January 21, 1957 (holding the October, 1949, judgment void), no action was taken by plaintiff to continue the effectiveness of the 1939 judgment by pursuing the revival proceedings (which had been instituted by the issuance of a scire facias on April 11, 1949) for more than a year when, on February 6, 1958, plaintiff moved for the issuance of and obtained the alias writ. It seems clear and we hold that plaintiff's delay for more

than a year in applying for the alias writ worked a discontinuance of the existence of the 1939 judgment by limitation under all the circumstances disclosed by this record and that, consequently, the trial Court correctly sustained defendant's motion to quash."

Thus we see clearly that the question decided by the State Court was solely one of State procedure decided under general law. Apposite to this situation is the language of this Court in *Herb v. Pitcairn et al.*, 324 U. S. 117, l. c. 125-6, 65 Sup. Ct. 459, 89 L. Ed. 789. We quote from 324 U. S. at pp. 125-6:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock v. Memphis*, 20 Wall. 590, 636; *Berea College v. Kentucky*, 211 U. S. 45 (53); *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U. S. 157, 164; *Fox Film Corporation v. Muller*, 296 U. S. 207. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments not to revise opinions."

II.

The State Court's Opinion Is in Complete Conformity With the Law as Enunciated by This Court.

The single paragraph so disproportionately emphasized by petitioner is in essence nothing more than a recognition of the truism so frequently expressed by this tribunal.

In *Parsons v. District of Columbia*, 170 U. S. 45, l. c. 51, 18 Sup. Ct. 521, 42 L. Ed. 943, this Court stated:

"It is trite to say that general principles announced by courts, which are perfectly sound expressions of the law under the facts of a particular case, may be wholly inapplicable in another and different case;"

In the case of *Armour & Co. v. Wantock et al.*, 323 U. S. 126, 65 Sup. Ct. 165, 89 L. Ed. 118, this Court at 323 U. S. 132-133 admonished:

"It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading."

See also *German Alliance Insurance Company v. Home Water Supply Company*, 226 U. S. 220, l. c. 234, 33 Sup. Ct. 32, 57 L. Ed. 195.

Obviously the brief excerpt from the opinion of the State Court concerning which petitioner complains was in no sense of the word a necessary element of its decision. It was merely a cautionary note as to the application of the doctrine in future cases. The paragraph in question was in nature parenthetical, and its complete omission would have left the Court's opinion just as logical, coherent and complete as it is in its present form.

III.

The Missouri Judgment Did Not Violate the Due Process Clause of the Fourteenth Amendment.

We submit that in asserting a lack of due process, petitioner has completely misconceived the meaning of the Fourteenth Amendment. The record shows beyond question that every requirement of due process was observed.

In point is *Standard Oil Company of Indiana v. State of Missouri*, 224 U. S. 270, 32 Sup. Ct. 406, 56 L. Ed. 760, where the following language appears in the opinion at 224 U. S. l. c. 287:

> "The Fourteenth Amendment guarantees that the defendant shall be given that character of notice and opportunity to be heard which is essential to due process of law. When that has been done the requirements of the Constitution are met and it is not for this Court to determine whether there has been an erroneous construction of statute or common law. *Iowa Central Railway v. Iowa*, 160 U. S. 389; *West v. Louisiana*, 194 U. S. 261. The matter was summed up by Justice Moody in *Twining v. New Jersey*, 211 U. S. 78, 110, where, citing many authorities, he said:
>
> 'Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, * * * and that there shall be notice and opportunity for hearing given to the parties. * * * Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this Court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law. * * *'"

In *Tracy v. Ginzberg*, 205 U. S. 170, 27 Sup. Ct. 461, 51 L. Ed. 755, Mr. Justice Harlan, in delivering the opinion of the Court, said at 205 U. S. l. c. 177-8:

> "The Court, proceeding entirely upon principles of general and local law, and giving all parties interested in the question an opportunity to be heard, decided that plaintiff had no right to that money. The decision of a state court, involving nothing more than the ownership of property, with all parties in interest

before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property."

To the same effect are:

Howard v. Kentucky, 200 U. S. 164, l. c. 172-3, 26 Sup. Ct. 164, 50 L. Ed. 421;

Central Land Company v. Laidley, 159 U. S. 103, l. c. 112, 16 Sup. Ct. 80, 40 L. Ed. 91.

IV.

The Fourteenth Amendment Does Not Guarantee Uniformity of Judicial Decisions.

Petitioner also contends that the State judgment is a denial of the equal protection of the laws within the meaning of the Fourteenth Amendment. Such contention is also devoid of merit.

In *Milwaukee Electric Railway & Light Co. v. State of Wisconsin*, 252 U. S. 100, 40 Sup. Ct. 306, 64 L. Ed. 476, it was stated at 252 U. S. l. c. 105-6:

"The company also insists that the ordinance is void because it denies equal protection of the laws. The contention rests upon the fact that since entry of the judgment below the Supreme Court of the State had decided *Superior v. Duluth Street Ry. Co.*, 166 Wisconsin 487, which the company alleges is not reconcilable with its decision in this case. The similarity of the ordinances and conditions in the two cases does not seem to us as clear as is asserted. But, however that may be, the Fourteenth Amendment does not in guaranteeing equal protection of the laws assure uniformity of judicial decisions, *Backus v. Fort Street Union Depot Company*, 169 U. S. 557, 569, any more than in guaranteeing due process it assures im-

munity from judicial error, *Central Land Company v. Laidley*, 159 U. S. 103; *Tracy v. Ginzberg*, 205 U. S. 170."

See also *Fidelity & Columbia Trust Company v. City of Louisville*, 245 U. S. 54, 38 Sup. Ct. 40, 62 L. Ed. 145, where at 245 U. S. l. c. 59-60, we read:

> "It is said that the plaintiff in error has been denied the equal protection of the laws because, if the argument is correct, which we have not considered, the decision in this case is inconsistent with earlier decisions of the Kentucky court. But with the consistency or inconsistency of the Kentucky cases we have nothing to do. *Lombard v. West Chicago Park Commissioners*, 181 U. S. 33, 44, 45. We presume that like other appellate courts the Kentucky Court of Appeals is free to depart from precedents if on further reflection it thinks them wrong."

The decisive language of this Court used in *Tinsley v. Anderson*, 171 U. S. 101, l. c. 106, 18 Sup. Ct. 805, 43 L. Ed. 91, and *Missouri v. Lewis*, 101 U. S. 22, l. c. 31-2, 25 L. Ed. 989, renders it clear that the equal protection of the laws guaranteed by the Fourteenth Amendment is something vastly different from the type of equality for which petitioner contends.

CONCLUSION.

Respondent, therefore, submits that the Petition for Writ of Certiorari herein discloses no reason whatever for the granting thereof, and that the same should be denied.

Respectfully submitted,

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